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No. 1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

WILLIAM ROGER PASCENTE and FRANK J. FURIO,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, William Roger Pascente and Frank J. Furio, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on December 20, 1966, and is not reported, but appears in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of the record.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed December 26, 1967 and is not yet reported, but is set forth in the Appendix hereto and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on December 26, 1967. On January 24, 1968, it was ordered that the petition for rehearing be denied, and on the same date, January 24, 1968, it was ordered that the petition for rehearing *en banc* be denied with two Judges voting to grant the rehearing *en banc*. (These orders appear in the appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is the mere use of the words "cartons of merchandise", without any further description in a search warrant, sufficiently specific to satisfy the requirement of the Fourth Amendment that "no Warrants shall issue, but upon probable cause * * *, and particularly describing *the* * * * *things to be seized*"?

2. Does not this decision of the Seventh Circuit Court of Appeals approving the use of the word "merchandise" to describe the things to be seized under a Search Warrant, constitute an approval of "General Warrants" contrary to the Constitution of the United States, and more particularly flatly contrary to this Court's decision in *Stanford* v. *State of Texas*, 379 U.S. 476?

3. Are the following grounds for the issuance of the Search Warrant sufficient to satisfy the requirements of the Fourth Amendment as "probable cause"?

The affidavit for the search warrant reads as follows:

> "The undersigned, being duly sworn deposes and says: That he has reason to believe that on the premises known as second floor of a two-family residence at 1913 West Ohio Street, Chicago, in the Northern District of Illinois, there is now being concealed certain property, namely several cartons of merchandise which constituted interstate commerce and were stolen therefrom. And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:
>
> > This information was furnished affiant by Special Agent Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr. of Mason-Dixon Lines, Chicago, carrier of freight that (sic) he received an anonymous call who stated he was a neighbor, that he observed at 11:30 P.M., February 11, 1965, two men unloading truck of said (sic) into said residence. Maryann Costello living downstairs her (sic) steps up and down stairs at 11:30 P.M. Said terminal (sic) stated he found five interstate shipments missing from one of their trucks after the time stated."

4. Does the Fourth Amendment's protection require that inferences from evidence submitted in support of a search warrant be drawn by a neutral and detached magistrate? (*Johnson* v. *United States,* 333 U.S. 10.) (*In Re Murchison,* 349 U.S. 133, 137.)

5. Where a magistrate himself composes the affidavit, which is the sole ground for the issuance of a search warrant, and then passes on its sufficiency, do the Fourth Amendment and Rule 41(c) of the Federal Rules of Criminal Procedure require that the person, whose home is searched and whose conviction ensues based upon the search, make any further showing of prejudice? (*Schmerber* v. *California,* 384 U.S. 757, 770.)

STATEMENT OF THE CASE.

This cause was instituted on May 22, 1965 by the filing of a two-count indictment charging, in the first count, possession of goods stolen from an interstate shipment of freight by defendants William Roger Pascente and Frank J. Furio, in violation of Section 659, Title 18, United State Code. The second count charged the defendant William Roger Pascente with the theft of the same goods in violation of the same section. The case was tried before the trial judge sitting without a jury, jury trial having been waived. All of the facts in the case were stipulated.

The error urged below arose out of a denial of the defendants' Motion to Quash the Search Warrant and to Suppress the Evidence. The defendants were convicted in the Court below and William Roger Pascente was placed on probation for a period of five years and the defendant Frank J. Furio was sentenced to the custody of the Attorney General of the United States for a period of eighteen months. Both defendants are at liberty pending appeal. The defendant, Frank J. Furio, is enlarged on bond in the amount of $10,000.00.

Upon review the errors relied upon relate to the denial of the Motion to Suppress, the sufficiency of the warrant, and the matter of execution. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois and denied the defendants' Petition for Rehearing. Due to an apparent conflict with another decision of the Seventh Circuit in *United States of America* v. *Milton James Roth,* which was handed down November 20, 1967, the petitioners here further sought a rehearing *en banc.* The rehearing *en banc* was denied on January 24, 1968 with Circuit Judges Kiley and Swygert voting to grant the petition for rehearing *en banc.* (The opinion in *United States* v. *Roth,* No. 16173, is printed in the Appendix hereto.)

STATEMENT OF FACTS

On February 12, 1965, Agents of the Federal Bureau of Investigation applied to the United States Commissioner, C. S. Bentley Pike, for a search warrant describing certain premises as "the second floor of a two-family residence at 1913 West Ohio Street, Chicago, Illinois." The warrant issued, the premises were searched, and the warrant executed on Friday, February 12, 1965, at 4:51 P.M. Agents there seized cartons of clothing, a full description of which is set forth in the inventory which is shown in the Appendix hereto. The premises were occupied by the petitioner, Frank J. Furio. The value of the goods was stipulated as being $735.00. The goods were taken on the evening of February 1, 1965, from the loading dock of the Mason-Dixon Lines, 3357 So. Justine St., Chicago, Ill. It was stipulated that the defendant William Roger Pascente worked as a city driver for Mason-Dixon.

Briefly stated, it would appear, from a reading of a stipulation which is filed in this Court but not made a part of the appellants' appendix, that someone managed to take and carry away from the loading dock certain cartons of clothing. Someone then took a "straight job" (a type of pick-up truck) and apparently drove the truck to the vicinity of 1913 West Ohio Street where the merchandise was deposited in the apartment of the defendant Frank Furio. Upon execution of the search warrant and during the course of their occupation of the premises, the defendant Furio entered the premises and was placed under arrest. The defendant William Roger Pascente was apprehended on the same day, February 12, 1965, by Agents of the Federal Bureau of Investigation. Neither defendant made any admissions concerning the merchandise and disclaimed any knowledge of the merchandise found on the premises of 1913 Ohio Street, Chicago, Illinois.

The facts are not in dispute. No contention is made that the evidence is insufficient. The entire question before this Court is whether or not the search warrant is a valid search warrant and that the affidavit executed in order to secure it sufficiently states probable cause for the issuance of said warrant, and the warrant properly issued.

SEARCH WARRANT

After the return of the indictment herein, the defendants filed, on June 18, 1965, a timely Petition to Quash the Search Warrant and to Suppress the Evidence, alleging in the petition that the search and seizure of the premises was illegal, unlawful, void and in violation of the Fifth Amendment to the Constitution of the United States, and the statutes and laws of the United States for the following reasons:

1. That said affidavit for search warrant is insufficient in law to establish probable cause for the issuance of a search warrant.

2. The affidavit states no facts sufficient to establish probable cause, justifying the issuance of a search warrant.

3. The search warrant herein was issued on the basis of an insufficient affidavit for search warrant and solely upon the belief of the affiant who made said affidavit, and upon certain unsupported hearsay.

4. That articles were seized from one of the petitioners which were not mentioned in the search warrant as the articles to be seized.

5. That the seizure, therefore, of said articles under color of the warrant was unlawful, void and in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The defendants here state that the United States used the evidence so unlawfully seized against the defendants on the trial of this cause. At the trial defendants objected to the evidence on the same grounds. As a result of the admission of said evidence the defendants stand convicted.

The affidavit for the search warrant reads as follows:

> "The undersigned being duly sworn deposes and says: That he has reason to believe that on the premises known as second floor of a two-family residence at 1913 West Ohio Street, Chicago, in the Northern District of Illinois, there is now being concealed certain property, namely several cartons of merchandise which constituted interstate commerce and were stolen therefrom. And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

> This information was furnished affiant by Special Agent Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr. of Mason-Dixon lines, Chicago, carrier of freight that (sic) he received an anonymous call who stated he was a neighbor, that he observed at 11:30 P.M., February 11, 1965, two men unloading truck of said (sic) into said residence. Maryann Costello living downstairs her (sic) steps up and down stairs at 11:30 P.M. Said terminal (sic) stated he found five interstate shipments missing from one of their trucks after the time stated."

Also considered by the United States Court of Appeals in a concurring opinion by Circuit Judges Cummings and Fairchild was the following matter:

> "The affidavit upon which the search warrant issued was concededly prepared by the United States commissioner although signed by an FBI agent. Rule 41(c) of the Federal Rules of Criminal Procedure provides in part as follows:
>
> > 'A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.'
>
> "This Rule of course contemplates that the supporting affidavit be prepared by the affiant and not by the commissioner. The commissioner is not meant to play the dual roles of magistrate and investigator. Cf. *In re Murchison,* 349 U.S. 133, 137. No prejudice to defendant has been shown, so that reversal is unwarranted. Nevertheless, the practice of having the commissioner prepare any such affidavits should be disapproved in order that it will not recur in any Districts of this Circuit."

REASONS FOR GRANTING THE WRIT

The Court should issue its Writ of Certiorari to the Seventh Circuit in the instant case for the following reasons:

1. The acceptance by the Seventh Circuit of the word "merchandise" (by definition the objects of commerce; wares; goods; commodities) as satisfying the Fourth Amendment requirement of description of things to be seized is in basic conflict with Constitutional guarantees, and constitutes a "General Warrant" in direct conflict with this Court's decision in *Stanford* v. *State of Texas,* 379 U.S. 476.

2. The acceptance of the affidavit for the search warrant in this case which requires not only interpretation, but translation, has so degraded the requirement of "probable cause" directed by the Fourth Amendment as to constitute basic conflict with Constitutional guarantees and departs entirely from the accepted concept that any construing must be liberal in favor of the individual whose privacy has been "invaded as directed in *Sgro* v. *United States,* 287 U.S. 206 and this Court's decisions relied on therein. 287 U.S. at 210.

3. The effect of the decision of the Seventh Circuit sanctioning the appraisal of a magistrate as to the sufficiency of an affidavit for a search warrant, of which he, the Magistrate, was himself the author, is to deprive the defendant of the neutral and detached consideration to which he is entitled under the Fourth Amendment and said decision is in conflict with this Court's decision in *Schmerber* v. *California,* 384 U.S. 757 and in *Johnson* v. *United States,* 333 U.S. 10.

4. The decision of the Seventh Circuit that such a deprivation of a constitutional entitlement to appraisal by a neutral and detached magistrate, though not endorsed by the Seventh Circuit, is deemed by it to be no consequence in the absence of a positive showing of individual prejudice and this presents a question that has not been, but should be, settled by this Court.

5. Two out of eight judges of the United States Court of Appeals for the Seventh Circuit favored the granting of a Petition for Rehearing *en banc* in this case, the ground for such Petition being an intermural conflict between this decision and *United States* v. *Roth,* 7 Cir., No. 16173 decided November 20, 1967 prior to the decision in this case. In the circumstances, this Court should exercise its power of supervision over lower Courts of Appeal that the public may be rightly informed of what constitutes its rights and immunities from police interference with privacy.

I.

In this case, there is absolutely no description whatever other than the word "merchandise". That word is so broad that it would include almost any conceivable type of "product" from any manufacturer. The requirement for specificity in a search warrant would be nullified by this decision. If it is sufficient for any agent to merely state that he believes "merchandise" is on the premises of someone's house then we are back to General Warrants or Writs of Assistance. Anything in a man's home except the house itself or the land upon which it rests can be said to be merchandise.

The decision in this case is not only contrary to the decision in the United States Court of Appeals for the same Circuit in *United States* v. *Milton James Roth,* No. 16173

dated November 20, 1967 (about which more will be said later) but is in conflict with this Court's decision in *Stanford* v. *State of Texas,* 379 U.S. 476, 481-486:

> "The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*' (Emphasis supplied.)
>
> "These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant."
>
> * * *
>
> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; *A Quantity of Copies of Books* v. *Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.
>
> "The requirements that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' *Marron* v. *United States,* 275 U.S. 192, at 196, 48 S.Ct. 74, at 76. We

> need not decide in the present case whether the description of the things to be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or 'cases of whiskey.' See *Steele* v. *United States,* No. 1, 267 U.S. 498, 504, 45 S.Ct. 414, 416, 69 L.Ed. 757. The point is that it was not contraband of that kind which was ordered to be seized, but literary material—'books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas.' The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history."
>
> *Stanford* v. *State of Texas,* 379 U.S. 476, 481-486.

The requirement of the Fourth Amendment that the warrant *shall particularly describe* the place to be searched, and the persons or *things to be seized,* has not been met in this case.

Wherefore, it is respectfully submitted that this Court issue its Petition for a Writ of Certiorari in this cause.

II.

The Court of Appeals for the Seventh Circuit recognized the affidavit was at least careless. In characterizing the affidavit it said:

> "The affidavit in question consists of a printed form filled in and completed in what is obviously a hasty, handwritten scrawl, replete with abbreviations (some of them rather unconventional) and composed in a highly cryptic style, as follows:"

* * *

> "This information was furnished affiant by Spec Ag Anthony Genakos of F.B.I. that Paul Picquet Terminal Mgr of Mason-Dixon Lines, Chicago, carrier of freight that he received an anonymous call who stated he was a neighbor, that he observed at 11:30 P.M., Feb. 11, 1965, 2 men unloading truck of said into said residence. Marianne Costello living downstairs her steps up and down stairs at 11:30 P.M. Said terminal stated he found 5 interstate shipments missing from one of their trucks after the time stated."

Contrary to the principals enunciated by this Court in *Sgro* v. *United States*, 287 U.S. 206, and the many authorities upon which the decision of this Court relies, the United States Court of Appeals for the Seventh Circuit ignored the basic principal that interpretations must be liberal in favor of the individual. In its efforts to sustain as valid the search, it reinterpreted what it thought the affidavit meant to say:

> "Careful study of this document, however, discloses certain facts. Sometime prior to execution of the warrant on Friday, February 12, 1965, shortly before 5:00 p.m., the Terminal Manager, Paul Picquet, of the Mason-Dixon Line, furnished information to Special Agent Anthony Genakos of the F.B.I., who in turn passed it on to the affiant, that he had found five "interstate shipments" missing from one of his trucks. The Terminal Manager had also reported receipt of an anonymous telephone call from an alleged neighbor of 1913 W. Ohio Street, Chicago, the address of the premises later searched, concerning his observation at 11:30 p.m., (an unusual time for delivery of commercial merchandise to a residence) on February 11, 1965, of the activities of two men who were unloading a Mason-Dixon truck and carrying the contents into the house at that address. Special Agent Genakos had also told the affiant that one Marianne Costello, who

> lived on the first floor of the two-apartment building searched, reported hearing footsteps going up and down the stairs at 11:30 p.m. that night."

The petitioners here submit that the Court of Appeals' holding that the search warrant was based on "hearsay but was hearsay from three different sources, two of which were identified, all of which were mutually corroborative in part," ignores the petitioners' basic contention.

The only source which places the "merchandise" (whatever that is) within the premises is an "anonymous call". Hearing footsteps at 11:30 P.M. and finding 5 interstate shipments missing do not relate to the presence of the "merchandise" within the premises. The anonymous call is the only source. The decision of the United States Court of Appeals for the Seventh Circuit completely ignores the requirement that the hearsay must be "from a source which in the past has proven reliable." *Jones* v. *United States,* 362 U.S. 257; *Aguilar* v. *State of Texas,* 378 U.S. 108.

Actually, it can be readily seen that the presence of "merchandise" in the described premises is based on nothing but an "anonymous call". We submit that this decision so far departs from the recognition by this Court that any proceeding by search warrant is drastic and must be clinically approached, that this Court should issue its Writ to the United States Court of Appeals for the Seventh Circuit in this cause.

III.

In a concurring opinion, two of the three judges of the panel joining, the following is stated:

> "CUMMINGS, Circuit Judge, with whom FAIRCHILD, *Circuit Judge,* joins, concurring. The affidavit upon which the search warrant issued was concededly pre-

pared by the United States commissioner although signed by an FBI agent. Rule 41(c) of the Federal Rules of Criminal Procedure provides in part as follows:

> 'A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.'

"This Rule of course contemplates that the supporting affidavit be prepared by the affiant and not by the commissioner. The commissioner is not meant to play the dual roles of magistrate and investigator. Cf. *In re Murchison*, 349 U.S. 133, 137. No prejudice to defendant has been shown, so that reversal is unwarranted. Nevertheless, the practice of having the commissioner prepare any such affidavits should be disapproved in order that it will not recur in any Districts of this Circuit."

The rights here affected are of constitutional proportions. It is a right protected by no less than the Fourth Amendment which Rule 41(c) implements. The Supreme Court has had occasion to speak about "detached magistrates".

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magis-

> trate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *U. S.*, 333 U.S. 10, 13-14. See also *Schmerber* v. *United States,* 384 U.S. 757, 770.

Wherefore we submit this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

IV.

The Court will note that in that portion of the concurring opinion quoted hereinabove, it is emphasized that no prejudice to the defendant was shown in order to warrant reversal. Thus is presented a novel and consequential question which has never been, but should be, settled by this Court. It is submitted to this Court that it should be sufficient that there has been a violation of the Federal Rules of Criminal Procedure, which implement the Fourth Amendment to the Constitution of the United States to insure that a neutral and detached magistrate stand as a bulwark to insure privacy. These petitioners submit to the Court that further answer to the Seventh Circuit's finding of no prejudice is that both of them have been convicted and one faces eighteen months incarceration as a result of this invasion. It should also be noted that this Court's decision in the *Murchison* case relied upon by the United States Court of Appeals for the Seventh Circuit was reversed.

V.

The decision of the United States Court of Appeals for the Seventh Circuit in this case, hereinafter referred to as *Pascente,* is contrary to this Court's decision in *United States* v. *Milton James Roth,* No. 16173 dated November

20, 1967, (decision not reported but attached hereto as part of the Appendix), hereinafter referred to as *Roth*.

In the *Pascente* case the decision was by Judge Knoch, Judge Fairchild and Judge Cummings. The decision in *Roth* was by Chief Judge Hastings, Judge Kiley and Judge Swygert. The panel in the *Pascente* case held that the word "merchandise" was not unduly vague.

This Court in the *Roth* case held as follows (page 4 of the slip opinion):

> "When Morrison's testimony is compared with his statement in the affidavit, a contradiction is disclosed, glaring enough to require the trial court to find the affidavit insufficient as a matter of law.[3]"

"[3] If Morrison's testimony is the correct version of the information given by the informant, the term 'products' could refer to any of the full range of items manufactured by Hamilton Beach rather than specifically to the stolen blenders. See p. 7 infra."

Turning then to page 7 of the *Roth* opinion:

> "Both of these omissions are highly critical in view of the nature of the premises, a 'garage-type warehouse,' and the type of merchandise stolen, a product that is mass produced by a nationwide manufacturer of a variety of household electrical appliances. Without detailing the date of Noonan's observation and what he specifically saw, Morrison's statement might have described any of a large number of warehouses that had received a shipment of Hamilton Beach products prior to or contemporaneously with the theft of the blenders in question. The statement, therefore, is too imprecise to establish probable cause that what Noonan observed on the defendant's premises was the stolen blenders."

This Court has held by the *Roth* decision that the word "products" even though coupled with Hamilton Beach is

insufficient as a matter of law. In the *Pascente* case, however, there is absolutely no description whatsoever other than the word "merchandise."

In both cases a Petition for Rehearing was filed before the Seventh Circuit. The Government's Petition for Rehearing in *Roth* was denied. These petitioners also petitioned for Rehearing *en banc* because of the intramural conflict demonstrated hereinabove. That also was denied, but two of the judges of the United States Court of Appeals for the Seventh Circuit were of the opinion that it should have been allowed. The two judges who were of the opinion the Court should sit *en banc* were part of the earlier panel in the *Roth* case.

It is patent that there now subsists two decisions in this Circuit contradictory in nature. The Circuit is left without a controlling standard in the important area of search and seizure going directly into individual constitutional rights. In the circumstances, we request this Court to exercise its power of supervision over lower Courts of Appeal and particularly the Seventh Circuit, that the public may be rightfully informed of what constitutes its rights and immunities from police interference with privacy.

It is respectfully submitted that this Court should issue its Writ of Certiorari to the Seventh Circuit for that purpose.

CONCLUSION

WHEREFORE, these Petitioners pray this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

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